STATE OF MICHIGAN

COURT OF APPEALS

GARDEN CITY,

Plaintiff-Appellant,

v

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
February 18, 2010

No. 288565
Wayne Circuit Court
LC No. 08-103236-CZ

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

In this contract action, plaintiff Garden City appeals as of right from the circuit court's grant of summary disposition to defendant Michigan Municipal Risk Management Authority (MMRMA). We affirm.

I. Summary of Facts and Proceedings

MMRMA is a group self-insurance pool formed pursuant to intergovernmental contract pursuant to MCL 124.5, of which Garden City is a member.[1] The instant matter involves a coverage dispute between Garden City and MMRMA arising out of litigation in which Wayne Oakland Contracting, Inc. sued Garden City and recovered a $12 million judgment for breach of contract.[2] After unsuccessful appeal to this Court and our Supreme Court, the $12 million

[1] MCL 124.5(1) provides, in relevant part:

> Notwithstanding any other provision of law to the contrary, any 2 or more municipal corporations, by intergovernmental contract, may form a group self-insurance pool to provide for joint or cooperative action relative to their financial and administrative resources for the purpose of providing to the participating municipal corporations risk management and coverage for pool members and employees of pool members, for acts or omissions arising out of the scope of their employment, including

[2] We recognize Garden City's argument that tort claims were also alleged. However, Wayne
(continued…)

judgment became final. MMRMA denied coverage for the judgment as well as Garden City's attorney fees for the Supreme Court application.

Pursuant to the Joint Powers Agreement, article 16, section 3:

> The Executive Director shall decide all questions of coverage in specific cases. The Member may appeal the Executive Director's decision to the Board. The Board's decision shall be final and binding. All other disputes between MMRMA and any Member involving this Joint Powers Agreement, Coverage Documents, rules, or administrative procedures shall be decided by the Board of Directors.[3] The Board's decision shall be final and binding.

Although Garden City had previously made statements that it was aware that only tort claims, and not contract claims, were subject to coverage,[4] when MMRMA denied coverage and refused to indemnify Garden City, Garden City initiated MMRMA's administrative appellate process and appealed the executive director's coverage decision to the Board. Garden City argued that the coverage documents were ambiguous. Both parties submitted briefs and materials to the Board and a hearing was held on December 1, 2005. The Board heard oral arguments and Garden City was represented by counsel. The Board indicated that it would render its decision at the January 12, 2006 meeting, at which time the Board unanimously approved a resolution affirming the executive director's decision:

> WHEREAS, MMRMA's Executive Director rendered a Coverage Decision regarding the November 25, 2002 Judgment against Garden City in the case of Wayne Oakland Contracting Inc v City of Garden City and Garden City Downtown Development Authority, Wayne County Circuit Court Case No. 00-24475 CZ[;] and
>
> WHEREAS, Garden City has appealed the Executive Director's coverage decision to the MMRMA Board of Directors; and

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(…continued)

Oakland Contracting, Inc. elected to have its award entered based on the breach of contract claim. Therefore, the judgment is based upon a contract claim, regardless of whatever other claims were asserted.

[3] MMRMA's Board of Directors will be referred to throughout this opinion as "the Board."

[4] For example, on October 18, 2002, counsel for Garden City sent a letter to the mayor and city council members which stated, in relevant part:

> We met last Monday with the MMRMA Claims people so that everyone is clear that the Plaintiff is pursuing two separate avenues. They first avenue is a contract claim. The second avenue is a tort claim of misrepresentation. Any judgment arising from tort would be the responsibility of MMRMA. Any judgment arising from breach of contract would be the responsibility of Garden City.

> WHEREAS, Garden City and MMRMA have provided written submissions to the MMRMA Board of Directors which the MMRMA Board of Directors have reviewed and considered; and
>
> WHEREAS, oral arguments on Garden City's appeal took place December 1, 2005 at the MMRMA offices.
>
> NOW THEREFORE BE IT RESOLVED, that in accordance with the Joint Powers Agreement, Article 16, MMRMA's Executive Director's decision is hereby AFFIRMED for the reasons set forth in MMRMA's General Counsel's written submission. Further, in accordance with the Joint Powers Agreement, this decision is binding on both Garden City and MMRMA and is final.

After the Board rendered its decision, Garden City's city manager was quoted in a newspaper article as saying, "Our next decision is whether to appeal the decision to court. *We did sign paperwork saying this decision would be final* (emphasis added)." Subsequently, Garden City filed suit in circuit court to challenge the denial of coverage. MMRMA moved for summary disposition,[5] arguing, among other things, that judicial review of its coverage decision was precluded based on the language in the Joint Powers Agreement that the Board's decision was "final and binding." The circuit court granted summary disposition, concluding:

> In any event, it's clear that Garden City voluntarily joined MMRMA . . . . [T]hey became voluntary participants and voluntarily joined this pool and they did it on a contractual basis.
>
> The contract that's in place not only with regard to Garden City but the other municipalities has this dispute resolution process wherein the executive director decides disputes and then there's an appeal process whereby the board of directors then handles appeals from the executive director's decision. And as plaintiff argues . . . this appeal process . . . violates due process.
>
> And the Court has reviewed plaintiff's arguments and the fact that there are claimed violations of due process in the sense that the board isn't impartial, that as decision-makers they're to be impartial, and there's other due process claims. The Court in reviewing what's been submitted doesn't find that there's at this point even a prima facie showing that there's the necessary impropriety or bias or prejudice among the board members. And the fact that there's some kind of financial benefit that the entire board enjoys having to deal with fewer claims I don't think that establishes . . . or even suggests that . . . they aren't impartial.
>
> There is notice, there is an opportunity to be heard, and all the other due process requirements I think are in place with regard to this matter. . . .

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[5] In its motion, MMRMA cited the standards for summary disposition under MCR 2.116(C)(7), (8) and (10), but never indicated under which theory it sought relief.

> And it's clear to the Court also that the intent of the contract and the intent of the coverage is to cover tort claims and to not cover contract claims. . . . [I]t's clear to the Court that the case that was filed by Wayne Oakland Contractors against Garden City really in almost all of its elements and components was a contract case. . . .
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> So the exclusion applied to Garden City. And for them to try and seek indemnification because they lost—because they claim that there was some torts involved really the Court finds to be unfounded. And when you get right down to it, Garden City was only to be covered for . . . their tort claims. The exclusion applied to the contracts, and nothing in the kind of internal appeal process suggests that anything was improper or that there's any violation of due process.

Garden City requested reconsideration, which the circuit court denied. Garden City now appeals.

II. Standard of Review

This Court reviews de novo a court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the circuit court relied on evidence outside of the pleadings and did not indicate under which court rule it granted summary disposition, we assume it was granted under (C)(10). *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003). "In reviewing the motion, the pleadings, affidavits, depositions, admissions, and any other admissible evidence are viewed in the light most favorable to the nonmoving party." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

III. Analysis

Garden City argues that the appellate process in the Joint Powers Agreement denied it due process. We disagree.

Relying on *Renny v Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986), Garden City argues that the process by which the executive director determines coverage disputes that are then appealable to the Board violated due process because it was denied an impartial decision maker. However, Garden City contractually waived its due process rights by signing the Joint Powers Agreement. Therefore, our first question must be the validity of the contractual waiver.

MCL 124.7b provides that group self-insurance pools may not misrepresent the terms of it policy or the benefits and privileges promised under a policy and may not misrepresent or make incomplete comparisons of policies to induce people to obtain coverage with the group self-insurance pool. However, Garden City has not alleged that MMRMA misrepresented the policy or the benefits available under the policy in this case. Therefore, MCL 1224.7b provides no cause of action to Garden City in this matter.

MCL 500.2254 provides, in pertinent part:

> No article, bylaw, resolution or policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in the state . . . .

Thus, MCL 500.2254 explicitly prohibits this type of contractual waiver in insurance contracts. However, this provision is inapplicable in this case because it applies to insurance companies and insurers, and group self-insurance pools are explicitly not insurance companies or insurers. MCL 124.6 ("Any group self-insurance pool organized pursuant to section 5 is not an insurance company or insurer under the laws of this state.").

Garden City mentions MCL 124.5(4), which provides that group self-insurance pools "shall have the power to sue and be sued." However, this is a general grant of power to sue and be sued, just as any natural person can sue or be sued. It does not grant Garden City a cause of action. Furthermore, given the existence of MCL 500.2254 in the insurance code and the Legislature's express exclusion of group self-insurance pools from its applicability, it is clear that there is no statutory authority that prevents the contractual waiver contained in the Joint Powers Agreement.

Having found no statutory prohibition on the contractual waiver, we must consider Garden City's argument that it was unconstitutional to waive, in advance, its right to appeal decisions on coverage made by the Board.

The contractual waiver in this case occurred "before suit has been filed, before any dispute has arisen and whereby a party gives up in advance his constitutional right . . . to notice and an opportunity to be heard." *D H Overmyer Co, Inc v Frick Co*, 405 US 174, 184; 92 S Ct 775; 31 L Ed 2d 124 (1972) (internal quotations omitted). In *Overmyer*, the United States Supreme Court held that where a contract is not one of adhesion and the parties have equal bargaining power, a knowing and voluntary waiver of rights to notice and a hearing are permissible. *Id.* at 186-187. Here, Garden City is a municipal corporation with widespread activities, representation by counsel, and has been party to numerous contracts. This is not a case that involves unequal bargaining power or a contract of adhesion. See *id.* at 186. Based on the record, it is clear that Garden City "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed . . . and that it did so with full awareness of the legal consequences." *Id.* at 187. Accordingly, we hold that the contractual waiver contained in the Joint Powers Agreement was valid and Garden City is bound to the appeals process to which it contracted under the Joint Powers Agreement. Because that process provides for the Board to be the appellate body, rather than some neutral arbiter, Garden City was not entitled to a neutral decision maker.

Nevertheless, the Board's decisions are not beyond judicial review. In *Whispering Pines AFC Home, Inc v Dep't of Treasury*, 212 Mich App 545, 550-551; 538 NW2d 452 (1995), this Court concluded that the plaintiff "could, and in fact did, contract to waive such constitutional rights as may exist . . . by agreeing to submit to . . . a contractually defined process leading to final decision by a designated person or officer" and that "[i]f the parties are competent to make the contract in the first instance, they are competent to include such a dispute resolution clause." However, it added a limitation "derived from contract law and not as a by-product of

constitutional doctrine, that the officer's decision not be a product of fraud or tainted with equivalent bad faith." *Id.* at 551. Because the present case also arises out of contract law, judicial review is appropriate if the decisions of the executive director and the Board are not free from fraud or bad faith.

After reviewing the record, we conclude that Garden City has not alleged fraud or equivalent bad faith.[6] At best, Garden City has simply asserted that the Board was not an impartial decision maker because it had a vested financial interest in the ultimate coverage decision. However, this partiality is present every time the Board must make a coverage decision. Furthermore, a contrasting partiality also exists, as the Board members also have a vested interest in finding coverage for various claims, so as to increase the member's own coverage. By agreeing that the Board was the final arbiter of coverage decisions, Garden City accepted these inherent risks. Therefore, Garden City's claims are insufficient to rise to the level of fraud or bad faith. Because Garden City "has made no claim of fraud or bad faith that would vitiate the contractual [appellate] process, the limitation is irrelevant to this case." *Id.* Accordingly, the circuit court properly dismissed Garden City's complaint.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

[6] The affidavit provided by Garden City's City Manager suggests that Garden City was not adequately represented by its counsel in the underlying lawsuit because the firm was hired by MMRMA and was, allegedly, the firm hired to "defend all of its member insureds." Not only is this issue irrelevant to whether the Board properly rendered a coverage decision under the Joint Powers Agreement, but it is an issue involving that specific attorney for which a separate malpractice action has already been brought and resolved.